A Guide To

Bureau of Workers' & Unemployment Compensation

Unemployment Appeals Hearings

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INTRODUCTION

The purpose of this booklet is to help you understand what happens at a unemployment hearing. We'll also tell you how to prepare for the hearing, so you can make your best case to the Administrative Law Judge. We hope that after you have read this booklet, you will understand whom and what to take to the hearing, what you must prove, and how to do so.

The information in this booklet is not legally binding, but is provided for informational purposes.

Free Representation

Two groups of independent ADVOCATES are available to assist you in presenting your case before the Administrative Law Judges and the Board of Review. THERE IS NO COST TO YOU FOR THE USE OF AN ADVOCATE.

One group is available only to assist claimants; the other group is available only to assist employers. The employer advocates will assist in both matters related to unemployment benefits and unemployment taxes.

You can choose your own ADVOCATE from among those available in your area. They have all passed a comprehensive examination regarding their knowledge of the unemployment insurance law and procedures.

For more details about the ADVOCACY PROGRAM, call 1-800-638-3994. If you wish to have an ADVOCATE represent you, call as soon as you have filed your appeal to the Administrative Law Judge or the Board of Review.

Basic Terms Used At A Hearing

We'll begin by explaining some of the terms used most often in a hearing.

An unemployment insurance Administrative Law Judge is an attorney who works for the State of Michigan, hearing and deciding cases involving unemployment compensation. His or her job is to review documents and to listen carefully to the statements of both sides at the hearing, and to decide what the facts are, based upon those statements and any other evidence. The Administrative Law Judge may also question the witness(es). The

Administrative Law Judge then decides how the law must be applied to those facts.

Parties are the people whose rights might be affected by the outcome of an unemployment compensation case. There may be three parties at a hearing: the claimant (the individual seeking the unemployment benefits), the employer (the business that is, or may be, charged for the payment of benefits, or whose tax rate or liability for taxes is in question), and the Bureau of Workers' & Unemployent Compensation (BW&UC).

If a case gets to the Administrative Law Judge, it usually means that there is a disagreement about the previous BW&UC decision (redetermination). An employer may feel that the unemployment benefits should not be paid, or that the employer should not have to pay unemployment taxes, or that their tax rate is wrong. The claimant may feel that the BW&UC should not have denied his or her claim for benefits. The BW&UC may be at the hearing to support its previous rulings.

Evidence could be anything used by a party to convince the Administrative Law Judge about the facts of the case.

The most common type of evidence is called testimony which means statements made, under oath or affirmation, at the hearing, by a party or one of the party's witnesses, who has first-hand knowledge of the events.

Evidence can also be in written form, but there must be someone present at the hearing who can testify (give testimony) of their own knowledge about any documents. In reaching a decision later, the Administrative Law Judge must decide how much importance to give to each statement or document admitted as evidence.

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Witnesses are people who are brought or subpoenaed (ordered to appear) to the hearing by either party to give testimony about facts they personally know about. The Administrative Law Judge may limit the number of witnesses testifying about the same facts.

These are the terms we'll need to get started. Throughout the rest of this booklet, we'll be explaining some additional terms, as they come up.

Why Is It Important To Attend The Hearing?

There are several reasons why it is important for you to attend the hearing:

1. If you are the party who appealed the case and you do not show up at the hearing, the Administrative Law Judge may dismiss the case (that is, cancel the appeal) for lack of prosecution (that is, failure to appear to carry forth the appeal.)

2. If you are the party with the burden of proof (that is, with the requirement to "make the case"), and you are not present at the hearing, then no one will be present at the hearing to "make the case" and you will probably lose.

3. **The Administrative Law Judge attaches importance only to sworn testimony, and to documents supported by sworn testimony.** For that reason, even though the Bureau may have agreed with your point-of view in the past, the Administrative Law Judge must take a fresh look at the evidence, and cannot give much weight to the documents found in the file unless someone is at the hearing to testify about them.

4. The hearing is generally your last chance in the appeal process to present the facts of your case. Even though there are further steps available in the appeal process after the hearing, with rare exceptions **the only facts that will be taken into consideration in the rest of the appeal process are the facts established at the hearing**.

   Appeals to the Board of Review and the courts usually involve only arguments about the law, not about the facts.For that reason, the Division of Unemployment Appeals, which holds the hearings is critical in the appeal process.

What Happens First?

The Bureau first issues a decision called a determination, which tells whether unemployment benefits will be paid, how much will be paid per week, and how many weeks will be paid. If either party disagrees with the determination, they can protest, indicating their reasons for disagreeing. The Bureau will then usually review the case, and issue a redetermination. The redetermination may affirm the determination, or it may reverse the determination.

One of the parties (claimant or employer) may disagree with the redetermination. That party will send or deliver to the Bureau a written appeal, asking for a hearing before an Administrative Law Judge.

If the appeal is received on time, it will be scheduled for a hearing. If the appeal is received late, it must be dismissed by the Administrative Law Judge. However, if the late appeal is withdrawn before the hearing, and the Bureau is requested to reconsider its last decision, then the reason for the lateness of the appeal will be reviewed to determine whether the reason amounts to "good cause" that will excuse the late protest or appeal, and a ruling made. "Good cause" could include circumstances that reasonably prevented a party from filing on time, such as being unable to appeal due to hospitalization. However, being out of town, or forgetting to appeal, would not generally be "good cause".

After the appeal is filed, all parties will receive a Notice of Hearing, telling them where and when the hearing will take place. The hearing will usually be held at a regional hearing location.

The Division of Unemployment Appeals will mail the Notice of Hearingat least 10 days before the scheduled hearing date, or 20 days in advance of a fraud case. The back of the Notice of Hearing contains some very important information you will need to know about the hearing. **Be sure to read it carefully before the date of the hearing!**

Preparation Before The Hearing

You are entitled to have an attorney or other representative with you at the hearing, although that is not required. If either party does not have an attorney or representative at the hearing, the Administrative Law Judge will probably ask the questions. Each party should also be prepared to ask questions of all witnesses. If you or your attorney or representative, or a witness will be unable to attend the hearing, you may write to the Administrative Law Judge or call the Administrative Law Judge's office and request an adjournment (postponement) of the hearing, giving the reasons for the request.

However, adjournments are only granted for exceptionally good reasons. Generally, having another appointment which could be rescheduled will not be a sufficient reason for granting an adjournment. In an emergency, call the Administrative Law Judge's office before the hearing and explain the situation. Sometimes, if necessary witnesses are not all available, the hearing will be held with the available witnesses, and the hearing will be concluded on another day when any remaining, necessary witnesses are available.

Even if you choose to represent yourself, you will need to decide whether to have witnesses at the hearing. You should ask your witnesses to participate in the hearing well in advance of the hearing and tell them the date and time of the hearing.

Tell your witnesses to tell the truth about what happened, but do not tell them what to say or how to say it.

If your witness is a person who might not appear voluntarily, you may obtain a **subpoena** to require that person to appear. The subpoena may be obtained from the Bureau or the Administrative Law Judge's office. It should be given to the witness, by the party, a reasonable period of time before the scheduled hearing. The Bureau will not deliver the subpoenas for the party. After the hearing, a person who appears at a hearing under subpoena can receive a small fee for his or her time, and mileage, paid and mailed by the Bureau.

If the case involves a quit or a firing, the parties should bring as witnesses those persons who have personal knowledge of the details of the quit or firing, such as a supervisor or co-worker.

Since you will be given the opportunity at the hearing to ask questions of the other party and their witnesses, you should consider asking the Bureau in advance of the hearing, for a chance to look at the file in the case. From the file, you can see what statements the other party made to Bureau about the case. Often, those are the same statements they will make at the hearing, and you should decide whom you need to bring to the hearing as a witness, and what questions you will ask the person at the hearing about those statements.

It's a good idea to write down, before the hearing, questions you wish to ask the other party, as well as important points you wish to make on your own behalf. Take your notes to the hearing with you. It will give you added confidence, and allow the hearing to proceed more smoothly. However, because your notes are only to refresh your memory, you will not be permitted to read aloud from them as testimony.

Before the hearing, decide what documents (attendance records, employer policy statements, doctors' statements, check stubs) you

will need to make your case. Also, be sure to bring the witnesses who can testify about those documents. Doctors' statements and government records (such as safety inspection reports) may generally be admitted without the presence of a witness.

If you are hearing-impaired or have difficulty speaking or understanding English, you may request that a qualified interpreter attend the hearing to translate the proceeding. If you need an interpreter you should notify the Administrative Law Judge office as early as possible. If you bring your own interpreter the Administrative Law Judge may postpone the hearing until an independent interpreter can be obtained by the Administrative Law Judge's office.

Who And What Should Be Brought To The Hearing

Naturally, the claimant and employer should attend the hearing. Claimants should attend because their right to benefits is in question; employers should attend because their account may be charged for benefits paid as the result of the Administrative Law Judge's decision, or their liability as an employer may be affected by the decision. (Sometimes, a representative of the Bureau will also attend the hearing.) An Administrative Law Judge may also permit observers at the hearing.

In deciding whom, if anyone, you should bring as a witness, it is important to keep in mind that the hearing operates within the general requirements of the rules of evidence somewhat like a court, and that the Administrative Law Judge will not accept most hearsay testimony, that is, testimony not within the witness's own first hand knowledge.

This means that the Administrative Law Judge cannot permit a party or witness to answer a question by saying "I don't know what happened, but from what Joe tells me...." If "Joe" knows what happened, then "Joe" should have been brought to the hearing. Nobody else can testify as to what "Joe" would have said if he had been at the hearing. If, for example, a worker's attendance is at issue, the person with the most personal knowledge should appear as a witness to describe the claimant's attendance, and any warnings given.

In addition, to bringing in witnesses with personal knowledge of the facts, you may wish to introduce documents to support their testimony. Documents include such things as attendance records, written warnings, dates of verbal warnings, layoff notices, and letters or other correspondence that bear on the case. However, the employer's keeper of business records should be present at the hearing to testify about them, and to testify that they are the actual records.

Another reason it is important to bring in witnesses, in addition to documents, is that only a person who is present at the hearing in person or by phone can be cross-examined by the other party. A notarized statement generally cannot, therefore, be used at the hearing in place of a witness.

What Happens At The Hearing?

When a party arrives for the hearing at a regional Administrative Law Judge hearing location, they should notify the information clerk of their arrival and/or sign the schedule.

The parties (and their attorneys, representatives, witnesses, and any others) are then directed to a waiting area. It is usually a good idea to arrive at the hearing location 10 or 15 minutes early.

The Administrative Law Judge will call the case, and decide who will enter the hearing room. The Administrative Law Judge sits at a desk, and the parties and their witnesses and representatives sit at a table usually set up in front of the Administrative Law Judge's desk. The Administrative Law Judge will direct the parties and witnesses where to sit.

The Administrative Law Judge begins by introducing him or herself by name, and makes sure he or she has the names of all the parties, witnesses, representatives, and attorneys.

Hearings are tape recorded. Later, if a further appeal is taken, the tape recording is typed up as a transcript. It is the transcript that is reviewed at later levels of appeal. It is important for everyone to speak loudly and slowly, and not rustle papers or interrupt others, so that a good recording can be made. This transcript and the documents which are accepted as exhibits become the record of the hearing that is reviewed at higher levels of appeal.

The Administrative Law Judge asks the parties and witnesses to raise their right hands, and administers an oath or affirmation to each of the parties and witnesses, asking them to swear or affirm that they will tell the truth, the whole truth, and nothing but the truth.

The Administrative Law Judge will then identify each of the participants in the hearing for or the record, and will summarize the issue being appealed, and what the Bureau's previous decisions were in the case.

Often, the Administrative Law Judge may request that the witnesses be sequestered, that is, asked to sit outside the hearing room while the other witnesses are testifying, so that the witnesses will not be influenced by each other's testimony. An Administrative Law Judge may also determine that the testimony of the witnesses will be cumulative, that is, that they will all be testifying to the same set of facts. In that case, the Administrative Law Judge may accept the testimony of only one of the witnesses, and not permit the other witnesses of that party to testify.

The Administrative Law Judge will usually ask the party with the burden of proof to present its case first. There is a more complete discussion of who has the burden of proof, and what that means, on page 17 of this booklet.

If the party with the burden of proof has a representative or an attorney, that person will usually ask the party and the witnesses questions. This process is called direct examination. If the party with the burden of proof does not have a representative or attorney, either the Administrative Law Judge or the party may ask the questions. Even if the party has a representative or attorney, the Administrative Law Judge may ask additional questions to clarify issues.

After the party with the burden of proof presents testimony, the other party will have the opportunity to ask questions of each witness. This time for asking questions of the other side called **cross-examination**. If the party has an agent or attorney, that person will conduct the cross-examination; if the party does not have an agent or attorney, the Administrative Law Judge will conduct the cross-examination, or may ask the party to do so. Then the other party will present direct testimony, and their witnesses may be cross-examined.

Sometimes during a hearing, an issue will come up that was not originally part of the case, and was not indicated on the Notice of Hearing. In that situation, the Administrative Law Judge will permit an adjournment to allow the parties to prepare for that issue. If they feel prepared to give evidence on the new issue, the parties can agree to give up their right to an adjournment, and continue with the hearing.

The Administrative Law Judge is responsible for getting all of the information needed to fully understand the facts of the case. An important function of the Administrative Law Judge is **fact-finding**. This may mean that in some cases, the Administrative Law Judge will take over the function of direct or cross-examination, and it may mean that the Administrative Law Judge will exclude the testimony of some witnesses.

The Administrative Law Judge is also responsible for ensuring that, in general, the rules of evidence are followed in the hearing. For that reason, the Administrative Law Judge may rule that certain testimony is hearsay or is not relevant to the case and cannot be allowed, or that certain documents cannot be accepted, or that the testimony of certain witnesses will not be permitted.

The Administrative Law Judge has the responsibility to direct the progress of the hearing. When an Administrative Law Judge attempts to closely control the hearing, he or she is not being rude. Rather, the Administrative Law Judge is ensuring that the hearing is not delayed with testimony unrelated to the issues.

When the parties or their witnesses live out-of-state, or at a great distance from the hearing location, a conference telephone hearing may be conducted at the discretion of the Administrative Law Judge.

At the conclusion of the hearing, the parties may be given an opportunity to make closing statements, summarizing their positions on the issues in the case, if the Administrative Law Judge believes such statements will assist him or her in deciding the facts of the case.

What Happens After The Hearing

After the hearing, the Administrative Law Judge will review the testimony from the parties, some of which may be conflicting as to the facts. The Administrative Law Judge may also take into account the demeanor of the parties and their witnesses, that is, the manner in which they presented testimony and answered questions, and the consistency of a witness's testimony. This may help the Administrative Law Judge in determining the credibility (believability) of the parties and witnesses.

Based on these factors, the Administrative Law Judge will make findings of fact, which will be included in the written decision. In addition, the Administrative Law Judge will decide how the unemployment compensation law applies to the facts of the case, and the Administrative Law Judge's decision will contain a conclusion of law. The most important factor the Administrative Law Judge will use in making his or her decision is this: HAS THE PARTY WITH THE BURDEN OF PROOF SUCCESSFULLY MET THAT BURDEN? (See page 17 of this booklet for information about Burden of Proof.)

The Administrative Law Judge's decision will usually be issued within 60 days from the date of the hearing, and may be appealed to the Michigan Employment Security Board of Review by any losing party. The last page of the decision includes information about how to

appeal. It is also possible to request a rehearing before the Administrative Law Judge, but this will be granted at the discretion of the Administrative Law Judge, based on the reason stated in the request for rehearing.

The Administrative Law Judge cannot talk about the case to a party, before or after the hearing, because this would be unfair to the absent party. Thus, the Administrative Law Judge cannot take a party's telephone call. The Administrative Law Judge's office personnel can answer questions about the scheduling of the case or issuance of the decision.

Burden Of Proof: The Key To Making Your Best Case

In every hearing, the Administrative Law Judge's attention is focused on one primary issue: Has the party with the burden of proof carried that burden by substantial evidence, with first-hand testimony, and other evidence?

Misconduct Cases

In a misconduct case, the burden is always on the employer to prove:
(1) That the claimant engaged in misconduct, and
(2) That the isconduct occurred in connection with the work.

Misconduct has been defined by the Michigan Supreme Court, in unemployment compensation cases, as a willful and wanton disregard of the employer's interest, or of the employer's reasonable standards of behavior or the actions of the worker must show gross negligence (for example, giving wrong medication to a patient).

However, the mere inability to do the job, or goodfaith errors in judgment, is not considered misconduct in an unemployment compensation case. Remember that the employer can have a perfectly good and valid reason to fire an employee, even though the reason may not amount to misconduct for purposes of the unemployment compensation law.

The exact wording of the Michigan Supreme Court definition of misconduct for an unemployment compensation case is found on page 22 of this booklet.

The employer may need to show, through testimony and, if possible, documents, that there was an employer policy on the particular conduct involved, that the policy was applied equally to all employees, and that the employer had not previously condoned the actions that resulted in the discharge. In some cases, it is useful to show that the claimant had received warnings about infractions, but that the claimant continued in the misconduct after the warnings.

However, in the most serious offenses, warnings need not be given prior to discharge, in order for the worker to be disqualified for unemployment.

Voluntary Leaving Cases

In a voluntary leaving case, the burden is on the claimant to prove:

(1) That the leaving was **with good cause attributable to the employer** or

(2) That the leaving was **involuntary** (for example, due to personal health reasons).

To show that a leaving was with good cause attributable to the

employer, the claimant must prove that some condition existed that would have made continued employment unacceptable to a reasonable person. This condition must have been brought to the employer's attention and the employer did not correct it.

Unsafe working conditions, failure to pay wages when due, or failure to provide promised benefits or promotions (things over which the employer has control but does not correct) would be examples of situations that could provide a claimant with good cause attributable to the employer for voluntarily leaving a job.

To prove that a leaving was involuntary, the claimant may, for example, show that there was a health reason, verified by a doctor, that prevented the claimant from continuing to do the job, that they informed the employer of this fact and tried to find another job with the same employer, but were unable to do so. (However, a person who is unable to do any work they've done in the past or been trained to do, is no longer part of the labor force, and would not be eligible for unemployment benefits until again able to work.)

Refusal Of Suitable Work Cases

In a refusal of suitable work case, the burden of proof is on the **employer** to show:

(1) That an **offer of work was made** to the claimant;

(2) That the work offered was **suitable**;

(3) That the offer was **for a job that really existed**;

(4) That the offer was **specific**; and

(5) That the claimant **refused the offer**.

Elements of suitability of a job include, for example, wages, distance from claimant's residence, length of unemployment, and risk to claimant's health, safety, or morals.

The burden then shifts to the claimant to show that he or she had **good cause** for refusal of the suitable work.

Eligibility For Benefits

In an eligibility case, the burden of proof is always on the **claimant** to prove that he or she filed a claim and, for every week he or she is claiming benefits, he or she was:

(1) Able to work;
(2) Available for full-time, suitable work;
(3) Actively seeking work, unless this requirement has been excused; and
(4) Reporting for benefits as directed by the Bureau, or had good cause for not reporting or filing as directed.

It is a good idea to keep notes about where you looked for work each week, and to bring those notes with you to the hearing.

Liability / Tax Issues

In a liability / tax issue, if the employer believes that he or she should not have been held subject to the payment of unemployment insurance taxes,or should not be regarded as the successor of another employer's business, or should be charged a lower tax rate because the computation was wrong or the factors that were used in the computation were wrong, then the employer must bring the supporting documents and witnesses to the hearing.

Some Final Word

The best advice for parties appearing before an Administrative Law Judge is to be prepared for the hearing:

1. Know what the issue (question) before the Administrative Law Judge will be. It is indicated in the Notice of Hearing. Also, read the important information on the back of the Notice of Hearing.
2. Know who has the burden of proof.
3. Know what has to be proved in order to carry that burden of proof.
4. Review the file in advance, so that you can plan the major points you wish to make, and can plan the questions you wish to ask the other party.
5. Bring to the hearing the necessary papers, and witnesses. Make sure that the witnesses are persons who can offer testimony of their own knowledge.
6. Arrive at the hearing on time.

If the decision of the Administrative Law Judge is not in your favor, you may either request a rehearing before the Administrative Law Judge (for example, if you have additional facts that were not available to you at the original hearing), or you may appeal the Administrative Law Judge's decision to the **Michigan Employment Security Board of Review**, which is a separate agency from the BW&UC. The time limits for filing either a request for rehearing before the Administrative Law Judge, or an appeal to the Board, are described on the last page of the Administrative Law Judge decision.

You must file within the time limits given. If your request for a rehearing is late but within a year of the Administrative Law Judge decision, your request will be considered to be a request for a reopening of the case before the Administrative Law Judge, who will then have to decide whether you had "good cause" for reopening.

When it receives an appeal, the Board of Review reviews the transcript of the Administrative Law Judge hearing, which is the written form of the tape recording made at the hearing. The Board will then decide whether the Administrative Law Judge properly weighed the facts presented at the hearing, and properly applied the law to the facts. Occasionally, if requested by the parties, the Board of Review will allow parties to appear in person before the Board to present an oral argument.

We believe that if you follow the suggestions made in this booklet, you will be able to make your best case. We hope that by reading this booklet, you will know how to prepare for the hearing and what to expect, and will feel more at ease.

In addition, the Bureau welcomes your comments about your hearing, and about this booklet (what should be added, what needs clarification, etc.). Please direct your comments, in writing, to the Director, Division of Unemployment Appeals, Division of Unemployment, 3024 W. Grand Blvd., Suite 13-450, Detroit, Michigan 48202

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The following is the definition of misconduct adopted by the Michigan Supreme Court in the case of Carter v Employment Security Commission, 364 Mich 538, 541 (1961):

"[Misconduct in an unemployment compensation case is] ... conduct evincing such wilful or wanton disregard of an employer's interests as is found in deliberate violations or disregard of standards of behavior which the employer has the right to expect of his employee, or in carelessness or negligence of such degree or recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to his employer. On the

other hand, mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances, or goodfaith errors in judgment or discretion are not to be deemed 'misconduct' within the meaning of the statute."

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